

SECOND APPEAL No 73 of 1976

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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HEIRS OF SAIYED KARIMBHAI      RAHIMTULLA

Versus

HEIRS OF SAIYED RAHIMBHAI      DALUBHAI  
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Appearance:

MR JR NANAVATI for Petitioners  
MR MI PATEL for Respondent No. 1  
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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 14/03/2000

ORAL JUDGEMENT

This Second Appeal has been preferred against the judgment and order dated 20th October, 1975 passed by the Assistant Judge, Mahesana whereby the judgment and decree passed by the Civil Judge (J.D.), Chanasma at Harij has been set aside.

2. The respondent no.1-original plaintiff

filed Civil Suit No. 60 of 1965 for declaration of the ownership and redemption of mortgage of the suit land bearing survey no. 14, admeasuring 9 acres and 38 gunthas situated in the sim of village Ravad, Ta: Sami, Dist: Mahesana on the allegation that the suit field was in co-ownership and joint possession of the deceased Saiyed Noorbhai Rahimmala. The respondents-defendant nos. 2 and 3 are the heirs of the deceased Saiyed Noorbhai Rahimmala. The respondent no.1- original plaintiff and deceased Saiyed Noorbhai Rahimmala mortgaged the suit field to the appellant-original defendant no. 1 for a sum of Rs.351/- by a registered deed dated 2.5.1944 for a period of 13 years. The time limit of 13 years was to expire on 2.5.1957. The plaintiff gave a registered notice to the defendant no.1 to release the suit property which was served on him on 30th June, 1966. However, the property was not released. The defendant nos. 2 and 3 did not join themselves as plaintiffs. But to avoid non-joinder of parties, they were impleaded as defendant nos. 2 and 3 with the defendant no.1. The plaintiff claimed relief that the suit land be declared to be of the ownership of the plaintiff and father of the defendant nos. 2 and 3 and for redemption of mortgage and possession of that property. The defendant nos. 1 and 2 raised a plea before the trial court that the suit is not maintainable. That it is of the ownership and of possession of Saiyed Gafur and suit is bad for non-joinder of necessary parties. The deceased Saiyed Noorbhai Rahimmala was the co-owner of half of the property and Khatijabibi, widow of Saiyed Noorbhai Rahim Mala sold her western half portion of the suit field to Saiyed Gafur for Rs.250/- on 20th May, 1956 and since then he is in possession. It is also contended that the defendant no.1 after becoming the mortgagee of the whole suit property, gave it to Daud Karim to cultivate as his tenant. So, Gafur Daud is in possession of the western half of the property as its owner from 20.5.56 and he is a tenant in eastern half of the property of the defendant no.1 and is deemed to be the purchaser from 1.4.57. The defendant no.1 is not the mortgagee of the suit field. The plaintiff is not entitled to redeem the whole suit property and that the suit is not maintainable under the provisions of section 85 of the Bombay Tenancy and Agricultural Lands Act. The plaintiff has no cause of action against them and that the plaintiff is not entitled to any relief.

3. From the pleadings of the parties, the trial court framed 11 issues and after considering documentary as well as oral evidence, dismissed the suit with costs by its judgment and decree dated 29th August,

1970. Being aggrieved by the said judgment and decree of the trial court, the plaintiff filed an appeal being Regular Civil Appeal No.100 of 1970 before the District Court, Mahesana. After hearing, the District Court, Mahesana framed 4 points for determination and came to the conclusion that the registration of the mortgage deed was not necessary in view of the fact that it is admitted by the defendant s that the property was mortgaged by them in favour of the appellant-defendant no.1 by defendant nos. 2 and 3 alongwith the plaintiff. On the third issue as to whether Gafur Daud is a necessary party to the suit or not, the lower appellate court recorded a finding that he was not a necessary party and the judgment and decree passed by the trial court was set aside by the lower appellate court by its judgment and order 20th October, 1975 directing the preliminary decree for redemption of the suit land in favour of the plaintiff on his depositing the amount of RS.351/- in the court of the Civil Judge (J.D.), Chanasma within three months from the date of the decree in the prescribed form no. 7(B) of Appendix-D of the Civil Procedure Code. The original plaintiff has therefore, filed the present appeal in this Court.

4. Mr. Nanavati, learned advocate for the appellant-original defendant no.1 contended that the lower appellate court has committed an error in holding that the defendants have admitted the execution of the mortgage deed by them in favour of the defendant no.1. The lower appellate court has not read the entire written statement, on a particular point that portion has been read wherein it has been mentioned that the mortgage deed was executed, though the lower appellate court is required to read the entire written statement wherein the execution of the mortgage deed is denied.

5. I have considered the contention of the learned advocate for the appellant. The lower appellate court, after going through the material on record has come to the conclusion that it is an admission of the defendants that the mortgage deed was executed in favour of the appellant-original defendant no. 1 by the defendant nos. 2 and 3 and the plaintiff. The learned advocate for the appellant could not point out that the entire written statement or any other evidence on record was not considered in arriving at the findings by the lower appellate court that it is not an admitted fact that the mortgage deed was not executed.

6. The learned advocate for the appellant further contended that Gafur Daud was a necessary party

and he was not joined as a party in the suit, and hence, the suit was liable to be dismissed. According to him, the appellate court has committed an error in holding that Gafur Daud is not a necessary party. In view of the provisions of Order 34, Rule 1 of Civil Procedure Code, all persons having an interest either in the mortgage security or any right of redemption are required to be joined as parties to the suit relating to the mortgage. Gafur Daud, the owner of the half of the property transferred by the appellant/defendant no.1 and he is in possession of rest of the property as a tenant. As such, Gafur Daud is a necessary party to be impleaded in the suit proceedings for redemption of the mortgage. In absence of the impleadment of the necessary party, the suit is liable to be dismissed. I have carefully considered this contention of the learned advocate for the appellant in this respect also. This Gafur Daud is none else than grand son of the appellant-defendant no.1. He was holding the property as the owner of half of the property in the suit transferred by the appellant/defendant no.1. He is also in possession of the property as a tenant of the remaining half of the property on behalf of the appellant-defendant no.1. The lower appellate court has considered this aspect also carefully and recorded the finding that Gafur Daud is holding the property on behalf of the appellant-defendant no.1. He may be in possession either in the form as the owner from the appellant or in the form of a tenant on behalf of the appellant. Therefore, he cannot be said to have an independent right from the appellant and he is not a necessary party. The plaintiff is also entitled to redemption of the mortgage, even if he is only a co-sharer or co-mortgager.

7. I have considered the findings recorded by the lower appellate court. I do not find any good reason to upset them. The learned counsel for the appellant court not point out any substantial question of law for consideration of this Court. Thus, this appeal has no merit and it deserves to be dismissed. Accordingly, it is hereby dismissed. Rule is discharged with no order as to costs.

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